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No. 276

In the Supreme Court of the United States

OCTOBER TERM, 1962

NORTHERN CALIFORNIA PHARMACEUTICAL ASSOCIATION AND DONALD K. HEDGPETH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. 1a-22a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1962. The petition for a writ of certiorari was filed on July 26, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the jury's verdict that petitioners were guilty of violating the Sherman Act was supported by sufficient evidence:

   (a) that for Sherman Act purposes the prescription drugs remained in the flow of interstate commerce until they reached the ultimate consumer:

   (b) that petitioners had conspired to fix the retail price of prescription drugs.

2. Whether an agreement among pharmacists to fix the retail price of prescription drugs is immunized from the antitrust laws either because of the professional status of pharmacy, or because the agreement is a reasonable regulation of the practice of pharmacy and therefore not an unreasonable restraint on trade.

3. Whether the district court's charge to the jury was erroneous because of its failure to reiterate the necessity of finding that interstate commerce was restrained.

STATUTE INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 69 Stat. 282, 15 U.S.C. 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *. Every person who shall make any contract or engage in any combination or conspiracy declared * * * to be illegal shall be deemed guilty of a misdemeanor * * *.

STATEMENT

On December 14, 1960, a single count indictment was returned charging petitioners, Northern California Pharmaceutical Association ("Association") and Donald K. Hedgpeth, with a combination and conspiracy in unreasonable restraint of interstate trade and commerce in prescription drugs in northern California in violation of Section 1 of the Sherman Act (R. 7).[1] After a jury trial, petitioners were convicted, and a fine of $40,000 was imposed on the Association and a fine of $1,000 on petitioner Hedgpeth (R. 108–111). On appeal, these convictions were unanimously upheld by the Court of Appeals for the Ninth Circuit (Pet. App. 1a–22a).

The pertinent evidence may be summarized as follows:

1. THE PETITIONERS

The Northern California Pharmaceutical Association is a trade association incorporated in California, with its principal place of business at San Francisco, California (R. 210). Its membership is limited to retail pharmacists in the northern California area (R. 212), and over seventy-five percent of all pharmacies in this area are owned and operated by members of the Association. The Association has 1523 members of whom 1153 own and operate their own pharmacies (R. 67). The affairs of the Association are conducted by its executive board, which is composed

[1] The printed transcript of record in the court of appeals is cited as "R".

of the officers and directors of the Association, who are elected annually by the membership (R. 212–213).

Donald K. Hedgpeth was president of the Association from January 1955 to January 1956 (R. 692). Upon the expiration of his term, he was appointed chairman of a new committee which was organized by the executive board in November, 1956, to confer on the subject of prescription pricing (R. 222–223, 277, 687). Hedgpeth served as chairman of this committee, which was called the "Suggested Prescription Pricing Schedule Committee" (R. 233), from its organization in 1956 until 1960 (R. 700).

2. INTERSTATE COMMERCE

Before trial, petitioners stipulated that in 1959, fifteen leading drug manufacturers whose places of manufacture are outside the State of California sold over $12,500,000 of prescription legend drugs[2] to drug wholesalers in northern California, and over $8,000,000 of such drugs to pharmacies who are members of the Association; and that, in the same year, the five leading drug wholesalers in northern California sold over $13,500,000 worth of prescription legend drugs to Association members (R. 70–72). It was also stipulated that in each of the years covered by the indictment (1956–1960), the value of the prescrip-

[2] The term "prescription legend drugs" or "legend drugs" refers to drugs that can be dispensed by a pharmacist only on prescription by a licensed physician (R. 123–125).

tions dispensed by members of the Association exceeded $50,000,000 (R. 66–68).

There is a constant flow of prescription drugs from without the state through the warehouses of drug wholesalers in northern California to the pharmacies (R. 182–183, 200, 202), and over ninety-two percent of the drugs sold to consumers in northern California were sold as manufactured and were not compounded or changed in any way by the pharmacist (R. 166). Many manufacturers sell drugs directly to retail pharmacies in northern California, and such drugs are shipped from plants outside California to warehouses in California for delivery to the pharmacies (R. 70–72, 161–162, 191, 253–254, 272, 590–591).

3. THE CONSPIRACY

After his term of office as president of the Association expired in January 1956, petitioner Hedgpeth stayed on as a member of the executive board for the remainder of the year (R. 683). During this time he offered to prepare a pricing schedule for prescription drugs, which offer was accepted by the executive board at a meeting on November 7, 1956 (R. 685, 686). A six-man committee, of which Hedgpeth was chairman, was appointed by the president of the Association to study the subject of prescription pricing (R. 466–467, 687). All the members of this committee were owners of pharmacies (R. 469).

The committee met to discuss the format of the planned price schedule, distribution of the schedule to members of the Association (R. 695, 756), and the

various operating costs to be considered by Hedgpeth in formulating the schedule (R. 277, 283–285). Hedgpeth then submitted the pricing schedule agreed upon by his committee (R. 758) to the executive board of the Association at its regular monthly meeting on December 12, 1956 (R. 224). The executive board accepted the schedule recommended by Hedgpeth (R. 758–759), and had one thousand copies of the schedule printed at Association expense (R. 226–227, 510) and distributed to the membership without charge at the annual meeting of the Association in January, 1957 (R. 229–230, 699). Free copies were also mailed to members who did not attend the annual meeting (R. 230–231, 236). The schedule did not contain the name of the Association (R. 229, 492). It was entitled "Suggested Prescription Pricing Schedule for Non-Compounded Prescriptions" (R. 229). On the reverse side was the following statement (*ibid.*):

> This Prescription Pricing Schedule is the result of much thought and study plus many hours of work.
>
> It is designed to make the pricing of prescriptions quick and easy, accurate and uniform.
>
> It is based on a realistic knowledge of labor and other costs and uses the general formula—cost plus a reasonable markup plus a professional fee. It is hoped that all pharmacy will be helped through the use of uniform pricing methods.
>
> Don Hedgpeth,
>
> Issued 1/28/57.

The former president of the Association, Mr. Pine, testified that Hedgpeth's name, rather than the Association's, had been affixed to the schedule because "all of us" recognized the possibility "that it would be illegal if the Association put out a schedule" (R. 492).

In the fall of 1957, the Prescription Pricing Committee met to discuss rising costs (R. 768) and as a result of their discussion,[3] Hedgpeth recommended to the executive board of the Association that the prescription pricing schedule be revised upward (R. 769, 773). The recommendation was unanimously accepted by the executive board at its meeting on December 11, 1957 (R. 601). The revised schedule was printed by the Association pursuant to a resolution of the board of directors and a copy was mailed to each member of the Association at no cost (R. 233–234).

In March or April 1959, the Prescription Pricing Committee sent out 1100 questionnaires printed at Association expense (R. 339–341) to members of the Association asking whether or not they used the Hedgpeth Schedule (R. 312–313). Three hundred and seventy-two pharmacies replied, and 257 said they used the schedule. The questionnaire also asked whether the user favored increasing prices, leaving them as they were, or reducing them. Sixty-seven percent of the users in San Francisco and eighty-six

[3] Hedpeth testified on cross-examination (R. 773):

> The discussion at the [Prescription Pricing] committee meeting was that I be instructed to change the formula of the schedule to try and arrive at approximately seven to seven and a half per cent over-all increase, and they left the figuring to me * * *.

percent of the users outside San Francisco favored no change in prices (*ibid.*). The results of the survey were studied by Hedgpeth and his committee (R. 312–313, 376), but they nevertheless recommended increasing prices (R. 721). The recommendations of the committee were adopted by the executive board and a revised pricing schedule was printed and distributed on June 1, 1959 (R. 311, 342–343, 609–610).

The Association not only distributed the Hedgpeth Schedule to its membership "to make the pricing of prescriptions * * * uniform" (R. 229), but also undertook an active campaign to urge members to use the schedule in order to stabilize prescription prices and avoid embarrassing price differentials between different pharmacies (R. 240, 332, 604–606, 609, 611, 612).[4] The avowed purpose behind such activity was to create "better relations with the general public" by elimination of "ridiculously underpriced or overpriced prescriptions" caused by the "hit and miss pricing of prescriptions" (R. 601–602). Pharmacists were told they could "help build more public confidence in your profession by using the Hedgpeth schedule as a guide, and as a means of eliminating doubt-producing variance in prices" (R. 609). The bulle-

[4] Gvt. Exh. 27, which was a minute of a meeting of the executive board of the Association held on October 22, 1958, reads in part (R. 331, 332):

> Following a report by Mr. Hedgpeth on prescription pricing, a discussion was held on the need for continued activity in urging use of the pricing schedule. It was suggested that wherever feasible, local meetings be organized to discuss the matter, at which Mr. Hedgpeth agreed to take part whenever his time and availability would permit.

tins issued by the Association urging use of the Hedgpeth Schedule also emphasized its importance in eliminating "doubt-producing variance in prices" (R. 609, 610).[5] One of the "important reasons" given by defendant Hedgpeth for adoption of his pricing schedule was "[t]he industry-wide trend towards higher and more uniform prescription prices" (R. 608).

ARGUMENT

This petition, seeking review of the criminal convictions under Section 1 of the Sherman Act of a pharmaceutical association and one of its officials for conspiring to fix prices of prescription drugs through the use of a prescription pricing schedule, presents primarily the same issues as are involved in *Utah Pharmaceutical Ass'n* v. *United States*, No. 277, this Term, pending on jurisdictional statement. The *Utah* case is a civil action in which similar price fixing practices by another pharmaceutical association were held to constitute an illegal price fixing conspiracy and the grounds relied upon in our motion to affirm there equally call for denial of further review here. As we show below, the court of appeals in the present case correctly upheld petitioners' convictions, and no important question is presented.

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[5] The Association's bulletin carried a statement by the secretary of the Association expressing concern over the fact that "some pharmacies charge very low prices while others are very high" and warning that such "inconsistency is not in the best interests of pharmacy" (R. 246–247). Another bulletin advised that more pharmacists were using the Hedgpeth Schedule "[i]n the interests of: * * * Continuing to build public confidence by eliminating unjustifiable wide differences in prescription prices * * *" (R. 348).

1. In view of the undisputed facts concerning the interstate movement of prescription drugs (Statement *supra*, pp. 4–5), the court below properly characterized petitioners' argument on interstate commerce as raising the "narrow question" whether "the 'flow' must be said as a matter of law to stop before the drugs reach the consumer" (Pet. 12a). It correctly held that the answer "must be in the negative", at least with respect to direct shipments to pharmacies from out-of-state sources (Pet. 12a).

The court below properly applied the settled principle that " 'commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business.' *Swift & Co.* v. *United States*, 196 U.S. 375, 398 (1905)" (Pet. 12a). It stated: "We attempt to determine, not by tracing the erratic movements of a single prescription drug, but by observing the usual course of the whole trade, what ultimate disposition of the product is contemplated by the business people involved" (Pet. 12a). The court added that: "the undivided attention of manufacturer, warehouseman, wholesaler and retailer is upon the ultimate consumer and his immediate aides, the physician and pharmacist" (Pet. 13a). In the present case, there was a "practical continuity of movement" (Pet. 13a) from the manufacturer to the retailer and on to the consumer. See *United States* v. *Chrysler Corp.*, 180 F. 2d 557, 559–60 (C.A. 9). The objective of the interstate movement is, of course, the ultimate distribution by retail sales and the flow of commerce continues until

then.[6] Here, as in *United States* v. *Utah Pharmaceutical Ass'n*, 201 F. Supp. 29, 33 (D. Utah), pending on jurisdictional statement No. 277, this Term, the pharmacist is the "sole conduit" from sources outside the state to the consumer. Cf. *Las Vegas Merchant Plumbers Ass'n* v. *United States*, 210 F. 2d 732, 740 (C.A. 9), certiorari denied, 348 U.S. 817.[7]

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[6] In each of the following cases the product involved was held to remain in the flow of interstate commerce until it reached the ultimate consumer in intrastate retail sales: *United States* v. *Utah Pharmaceutical Ass'n*, 201 F. Supp. 29 (D. Utah), pending on jurisdictional statement, No. 277, this Term (prescription drugs); *Pevely Dairy Co.* v. *United States*, 178 F. 2d 363, 366 (C.A. 8), certiorari denied, 339 U.S. 942 (milk); *United States* v. *General Motors Corp.*, 121 F. 2d 376, 401 (C.A. 7), certiorari denied, 314 U.S. 618 (automobiles); *United States* v. *Erie County Malt Beverage Distrib. Ass'n*, 1957 Trade Cases ¶68,590, p. 72,386 (W.D. Pa.), affirmed, 264 F. 2d 731 (C.A. 3) (alcoholic beverages); *United States* v. *Gasoline Retailers Ass'n*, 1960 Trade Cases ¶69,596, p. 76,395 (N.D. Ind.), affirmed, 285 F. 2d 688 (C.A. 7), (gasoline). The fact that a prescription is prerequisite to the retail sale of drugs does not break the flow of the commodity from manufacturer to ultimate consumer, any more than would the regulatory aspects involved in distribution of alcoholic beverages, building materials to licensed contractors, etc. See *United States* v. *Erie County Malt Beverage Distrib. Ass'n*, *supra*, at p. 72,376.

[7] Petitioners contend that the court misapplied "controlling principles previously announced by this Court" (Pet. 17) by ignoring the requirement of "a prior order" from consumers which prompts the interstate shipment (Pet. 17, n. 48). However, in *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 570, this court expressly noted that there could be cases where goods, not received pursuant to a customer's prior order, would remain in interstate commerce after their arrival at the wholesaler's warehouse.

Dispositive on this point is *United States* v. *Sullivan*, 332 U.S. 689, in which the Court sustained the application of federal labeling requirements to drugs which were being held by retail druggists for intrastate sales, after having previously moved in interstate commerce. This regulation was held to be within "the constitutional power of Congress under the commerce clause" (332 U.S. at 697–698). See also *United States* v. *2600 State Drugs*, 235 F. 2d 913, 917 (C.A. 7), certiorari denied, 352 U.S. 848. Since "Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied" (*United States* v. *Frankfort Distilleries, Inc.*, 324 U.S. 293, 298), restraints upon the intrastate retail sales of drugs that have been shipped interstate are similarly subject to the Sherman Act.*

2. On the merits of their conviction, petitioners seek review of whether "proof of the publication and distribution of such prescription pricing schedules,

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* The reliance of petitioners (Pet. 17–18) upon *Eli Lilly & Co.* v. *Sav-on-Drugs*, 366 U.S. 276, is misplaced. In that case, the Court considered the scope of a New Jersey statute requiring certification of foreign corporations doing business in the state. It held that a drug manufacturer which had an office and employed "detailmen" in the state did intrastate as well as interstate business and was subject to the state law. The case did not touch upon the reach of federal authority under the commerce clause or consider the specific question of interstate commerce for purposes of the Sherman Act. As this Court pointed out in *United States* v. *South-Eastern Underwriters Ass'n*, 332 U.S. 533, 545: "past decisions of this Court emphasize that legal formulae devised to uphold state power cannot uncritically be accepted as trustworthy grounds to determine Congressional power under the commerce clause." See also *Stafford* v. *Wallace*, 258 U.S. 495, 525.

standing alone, is sufficient to establish a violation of Section 1 of the Sherman Act" (Pet. 21). But that question is not presented here, since there was not only proof of the publication and distribution of the prescription price schedule, but also, as pointed out in the Statement, *supra*, pp. 8-9, proof of a deliberate campaign by petitioners to have the schedule adopted, in order to establish and maintain uniform prescription prices.[9] Thus, the court below pointed to "[t]he scale and character of the campaign undertaken by the Association in behalf of the widespread use of the schedule" as established by the evidence (Pet. 18a). The court found the evidence of the price-fixing conspiracy to be "overwhelming" and concluded that "the jury had sufficient facts before it to find participation by the Association and Hedgpeth in an agreement to establish uniform prices by urging the adoption and promotion of the Hedgpeth Schedule" (Pet. 20a).

3. Petitioners also present the question whether their activity constituted a restraint on the practice of pharmacy as a learned profession and therefore lay outside the purview of the Sherman Act (Pet. 19–20). In *American Medical Ass'n* v. *United States*, 317 U.S. 519, this Court found it unnecessary to decide whether the practice of medicine was a

[9] In any event, since appellant is an association of competitors, its publication and dissemination of pricing schedules, without more, violates the antitrust laws. See *United States* v. *Nationwide Trailer System*, 156 F. Supp. 800, 805 (D. Kan.), affirmed *per curiam*, 335 U.S. 10; *Plymouth Dealers' Ass'n of Northern California* v. *United States*, 279 F. 2d 128, 133 (C.A. 9).

"trade" within the meaning of the Sherman Act, when it upheld the conviction of physicians' societies and individual physicians for restraining the business of Group Health Insurance, a corporation engaged in providing prepaid medical care and hospitalization. The Court held that (p. 528):

> * * * the calling or occupation of the individual physicians charged as defendants is immaterial if the purpose and effect of their conspiracy was such obstruction and restraint of the business of Group Health.

In the present case, the indictment alleged a restraint on the "interstate trade and commerce in prescription drugs" (R. 7). Since the manufacture and sale of prescription drugs is clearly "trade" within the Sherman Act, the conspiracy alleged and proved here was plainly a restraint upon trade.[10] As in *American Medical Ass'n*, the fact that the conspirators were a professional organization and members of a profession is immaterial. The true nature of petitioners' conduct was pointed out by the court below when it said: "It is evident that what is involved here is a plain and simple agreement to fix prices" (Pet. 6a), and that "it is in an area of 'entrepreneurial', rather than professional activity, that appellants are charged with having run afoul of the Sherman

[10] This is true even where the professional skill of the retail pharmacist has contributed to the preparation of the drug. It is particularly true here, where the uncontradicted evidence in the record showed that in each of the years covered by the indictment more than 92% of the prescription drugs sold to consumers in northern California were sold as manufactured, and were not compounded or changed in any way by the pharmacist (R. 166).

Act" (Pet. 8a). It is not necessary, therefore, to determine whether pharmacy is a "trade" within the meaning of the Sherman Act, since the offense alleged in the present case was a restraint on the sale of prescription drugs and not a restraint on the practice of pharmacy.

Petitioners rely upon the same arguments, that their prescription pricing schedule was simply "a much needed aid, tool and guide" to provide pharmacists with "the proper professional calculation of separate charges to be made for prescriptions" (Pet. 22), as a basis for justifying their restraint under the Rule of Reason. But it is beyond dispute that price fixing is illegal *per se* and may not be justified on the ground of alleged beneficial purpose. As this Court stated in *United States* v. *National Ass'n of Real Estate Boards*, 339 U.S. 485, 489: "Price fixing is *per se* an unreasonable restraint of trade. It is not for the courts to determine whether in particular settings price-fixing serves an honorable or worthy end." See also *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 223; *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 397–98.

4. Petitioners final point (Pet. 23–24) regarding an alleged error in the trial judge's charge to the jury, is clearly without merit. After first properly instructing the jury that "the Sherman Antitrust Act is applicable only to interstate commerce" (R. 1050), the district judge thereafter stated that the jury could find the defendants guilty if they believed, beyond a reasonable doubt, that defendants had agreed to fix the price of prescription drugs (R. 1052–53). Peti-

tioners objected to the charge on the ground that the court had failed to mention again, at that point, "the necessity of the jury to make a finding adverse to the defendants on the question of interstate commerce" (R. 1056). The judge then recalled the jury and reiterated to them that if they found there was no interstate commerce, "then that would dispose of the case, and in that event your verdict would be an acquittal for the defendants" (R. 1060–61).

These instructions by the trial judge were considered and expressly approved by the court of appeals, which said (Pet. 15a):

> The instructions must be read as a whole * * * and so read might well be said to have been sufficient as originally given. * * * Contrary to appellants' claim, the earlier and later instructions were not "contradictory" or "inconsistent," so as to require a withdrawal of one, and the "cure" was not at all unclear.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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